Supreme Court, U.S.
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No. 06-1677

IN THE

Supreme Court of the United States

Thomas Drennan Selgas,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Charles E. McFarland
Counsel for the Petitioner
338 Jackson Road
New Castle, KY
(502) 845-2754

Attorney for Petitioner

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QUESTIONS PRESENTED

I. ORIGINAL JURISDICTION PREREQUISITES FOR TAX COURT

Pursuant to I.R.C. §6212 the Secretary of the Treasury, after he makes a determination that there is a tax deficiency with respect to any tax imposed by subtitle A of the Internal Revenue Code, is required to send a Notice of Deficiency to the taxpayer. The courts have routinely held that a valid Notice of Deficiency is the prerequisite for the Tax Court to exercise jurisdiction.

The question raised is: Does the Secretary's failing to comply with the statutory provisions for making a determination by not following the provisions of I.R.C. §6020(b) and/or the issuance and sending of Notice of Deficiency by a person without delegated authority render the Notice of Deficiency invalid, thereby causing the Tax Court to lack jurisdiction?

II. REVIEWING COURT CONSIDERATION OF ON NON-RECORD EVIDENCE.

The courts are uniform in refusing to cite their decisions non-record or statements made in the parties' briefs not supported by evidence introduced into the record.

Lacking any support in the record, can the Tax Court and the Appellate Court, by implication, consider a statement in a brief submitted by the government that claims a person holding an office equivalent too but lacking the actual delegation of authority to be equivalent was permitted to issue and send a Notice of Deficiency?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Petitioner: "Thomas Drennan Selgas" and Respondent: "Commissioner of Internal Revenue").

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Sup. Ct. Rule 29.6 Thomas Drennan Selgas states:

1. He is not a subsidiary or affiliate of a publicly owned corporation; and

2. There is no publicly owned corporation, which is a party to this petition that has an interest in the outcome.

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PETITION FOR WRIT OF CERTIORARI

Thomas Drennan Selgas respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Tax Court's Final Decision (Appendix A) and Bench Decision (Appendix B) (per Judge Mark V. Holmes) were not unpublished. The 5th Circuit Court of Appeal's opinion (per Circuit Judges Smith, Wiener, and Owen) affirming the Tax Court decision is published at *Selgas v. C.I.R.*, 475 F.3d 697 (5th Cir. 2007) (Appendix D). A motion for rehearing was denied, but not published (Appendix E), nor was a stay of mandate sought.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on January 16, 2007 and the Motion for Rehearing was denied on March 21, 2007. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of I.R.C. §§6020, 6201, 6211, and 6212 are set forth in the Appendix.

STATEMENT OF THE CASE

A. Procedural History

On September 14, 2004, the Petitioner, Thomas Selgas (Selgas) received a document purporting to be a 90-day Statutory Notice of Deficiency. Selgas timely filed a petition to the Tax Court on December 8, 2004.

Selgas filed a Motion for Summary Judgment challenging the jurisdiction of the Tax Court which was heard and denied on the call date of October 31, 2005. When the case was called Selgas was seeking a redetermination of the deficiency on the basis that the tax was fully paid and claiming the purported Notice of Deficiency was invalid. A trial was held on November 1, 2005 and the Tax Court issued a bench opinion on November 2, 2005, holding the Notice of Deficiency was valid and affirming the alleged deficiency in its entirety. Judgment was entered on November 23, 2005. Selgas filed a Motion to Vacate the judgment on December 22, 2005. The Motion was denied without comment the same day. Selgas timely filed a notice of Appeal to the 5th Circuit Court of Appeals on March 15, 2006. The 5th Circuit upheld the Tax Court on January 16, 2007. A motion for Rehearing was denied on March 21, 2007.

B. Statement of Facts

On October 1, 2003 Selgas caused to be sent two sets of 1040 tax returns for the year 2002 to the Commissioner of Internal Revenue (CIR). These two tax returns were prepared and signed by two different accounting firms, Paul, Phipps, & Co., PLLC and Institute for Tax & Financial Services, Inc. respectively. The returns were completely filled out as far as the financial information needed to calculate the correct tax concerned, but were not signed by Selgas because they differed in the refund amount shown to be due to Selgas. The CIR did not process these returns.

On September 14, 2004, Selgas received a document purporting to be a 90-day Statutory Notice of Deficiency. Selgas timely filed a Petition with the Tax Court on December 8, 2004 seeking a redetermination of the purported deficiency, claiming the Notice of Deficiency was not valid. On September 26, 2005, Selgas filed a Motion for Summary Judgment on the basis that the Tax Court lack jurisdiction because the Notice of Deficiency was not valid. Selgas raised two issues: 1) the Notice was invalid because the Secretary failed to make a valid determination before issuing the Notice of Deficiency; and 2.) the Notice of Deficiency was not issued and sent by a person with delegated authority to do so. In his motion, Selgas submitted Freedom of Information Act (FOIA) material that he had received for the CIR's Disclosure Office to the Tax Court as evidence showing that the person who sent the Notice of Deficiency did not hold an office listed in the delegation order authorizing the issuance and sending of Notices of Deficiency.

On October 31, 2005 the Tax Court heard arguments on the Motion for Summary Judgment and ruled in its oral opinion that a Notice of Deficiency did not have to be signed. The Court did not address the fact of who sent the document, as specifically required in the law at I.R.C. §6212, nor did the Court directly address the delegation of authority issue, but nevertheless upheld the Notice of Deficiency as valid. The following day the Tax Court issued a bench opinion on November 2, 2005 holding that a return was not required to be made or signed by the Secretary, nor was a substitute return required and ruled that Notice of Deficiency was valid.

The Court issued its judgment on November 23, 2005 and Selgas responded with a Motion to Vacate the judgment on December 22, 2005. The Tax Court denied the motion the same day without comment.

Selgas appealed the Tax Court's decision on March 13, 2006.

Without oral arguments, the 5th Circuit upheld the Tax Court's decision. In it decision, issued on January 15, 2007, the Court rejected Selgas' argument that the Notice of Deficiency was issued by a person without delegated authority by noting that the government had stated in its brief that the person who issued the Notice of Deficiency was in an office with equivalent authority. But the Court reasoned that such an argument was largely irrelevant, as a signature was not required to make the Notice of Deficiency valid. The Court further ruled that the Notice of Deficiency was valid despite the lack of a substitute return prepared by the Secretary.

Selgas filed a Petition for Rehearing with the 5th Circuit. Said Petition was denied without comment on Mach 21, 2007. This Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

A. Introduction.

Selgas is mindful of the criteria set forth in Supreme Court Rule 10 which are used to determine whether the Court should review a decision of an appellate court. The criteria which are applicable in this case are:

> 1.) A United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court;
>
> 2.) has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

3.) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.

Selgas is also mindful of the recent comments by U.S. Supreme Court Justices Scalia and Breyer from their appearance at the American Constitution Society and the Federalist Society event in Washington D.C. on December 5, 2006, which was recorded and posted on the C-SPAN web site at: rtsp://video.cspan.org/60days/ac010607.rm:

> We cannot judge a Judge simply on the basis of whether we like the outcome of the case. ... However, there is an implied responsibility to do so; when a panel of [Appellate] Judges fails to interpret the statutes reasonably, Judges are supposed to interpret the statutes reasonably even if they don't agree with them, because it is not up to them to decide what garbage law is. ... The only objective criteria [for an Appellate panel to make it's determination] are the words adopted by Congress and once you get away from giving them their fairest meaning, we are in trouble. [Justice Scalia]

> Subjective judgment of a Judge should not play a significant role in the outcome of the case. ... [Justice Breyer]

With these principles in mind, Appellant believes that in upholding the Tax Court's ruling the panel misapprehended certain legal and factual issues in light of Supreme Court decisions and other circuit court decisions, departed from the normal and usual course of judicial proceeding by not upholding the law as passed by Congress.

ISSUE I

The Tax Court does not have jurisdiction when a Notice of Deficiency is invalid due to:

- **The Secretary failing to comply with the statutory provisions for making a determination pursuant to I.R.C. §§6201(a)(1), 6211(a);**
- **The Secretary not following the provisions of I.R.C. §6020(b) to make a subscribed return which is necessary for a valid determination;**
- **The person who issued and sent said notice was without delegated authority from the Secretary to do so.**

A. Sub-issue 1.

The Secretary is required to make a determination of a tax deficiency prior to issuing and sending a Notice of Deficiency.

1. Synopsis of Statutory Requirements.

The statutory scheme that Congress intended as a roadway to filing a petition to Tax Court starts with the authority that the Secretary has for making assessments, which is found in I.R.C. §6201. In addition authorizing the Secretary to make inquiries, determinations and assessments of all taxes §6201 also states,

> "The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title."

It should be noted, under I.R.C. §7701(a)(11), the term 'Secretary' has a special definition. 'Secretary of the Treasury' "means the Secretary of the Treasury, personally, and shall not include any delegate of his." But the term "Secretary" means the Secretary of the Treasury or his delegate. The term "or his delegate," according to subsection 7701(a)(12)(A)(i),

> "when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context."

This definition of delegate will be very important in the later discussion addressing the delegated authority source.

Since the Secretary has statutory authority to make assessments he also needs a statutory process of determining any such assessment. The following statutes explain the source of that authority.

First, The Secretary must determine that there is a deficiency. A deficiency, in simple terminology, is defined in I.R.C. §6211(a) as the amount of tax imposed by Title 26 which exceeds the sum of the amount shown on the taxpayers return, plus any previously assessed amounts, less any rebates. See *Laing v. United States*, 423 U.S. 161, 173-74 (1976) ("In essence, a deficiency as defined in the Code is the amount of tax imposed less any amount that may have been reported by the taxpayer on his return").

Thus, pursuant to the laws passed by Congress, in order for the Secretary to determine a deficiency there must be a return. As was quoted earlier, §6201 authorizes the Secretary to "assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title." This authority to assess is based on filing of returns, when either a taxpayer files a return or the Secretary files a return.

The provision in the Internal Revenue Code which permits the Secretary to make a return where a taxpayer

fails to make a return is found in I.R.C. §6020. It has two steps. §6020(a) is the first step. §6020(a) does not give any authority to make a return, but it does give the authority for the Secretary to invite the taxpayer to either make his own return or to sign the Secretary's calculation for a tax and waive the formal assessment process.

When the Secretary applies §6020(a) a "30 day letter" is sent to the taxpayer. This 30 day letter invites the taxpayer to file a tax return within a certain period of time or sign a form prepared by the IRS. The prepared form is generally Form 4549 which contains a calculation of the proposed tax. In effect, under §6020(a) the Form 4549 attached to the 30 day letter is treated as if it were, in fact, the taxpayers unsigned return. When the 4549 form is signed by the taxpayer it becomes his tax return. The practical aspect of this procedure is that a taxpayer may waive the notice requirements of the IRC in consenting to a deficiency assessment by signing the Form 4549.

This type of waiver has long been accepted. *Thomas v. Merchantile Nat'l Bank*, 204 F.2d 943, 944 (5th Cir. 1953) (interpreting a waiver executed by a taxpayer under §871, the precursor to §6213, as having "waived the ninety-day notice and other procedural requirements" of the statute). A duly executed IRS Form 4549 is a proper waiver of the deficiency notice requirements. See also *In re Barry*, 48 B.R. 600, 603 (Bkrtcy. E.D.Tenn. 1985) (discussing IRS Form 4549 as constituting "a proper waiver of [deficiency] notice as provided in I.R.C. § 6213(d)"); and *Aguire v. Commissioner*, 117 T.C. 324 (2001) (granting summary judgment to the IRS on the ground that petitioners signed IRS Form 4549, waiving their right to contest their tax liabilities, and thus precluding the need to send them a deficiency notice).

If a taxpayer neglects to respond to the '30 day letter' or fails to make a return or sign the Form 4549, step two

of §6020 becomes applicable. §6020(b) authorizes the Secretary to make a return from his own knowledge and from such information as he can obtain through testimony or otherwise, if any person "fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefore, or makes, willfully or otherwise, a false or fraudulent return." The status of such a return is stated in subsection (b)(2), i.e. "Any return so made and subscribed by the Secretary shall be *prima facie* good and sufficient for all legal purposes."

In the case of a taxpayer which has failed to file a return, once the Secretary has subscribed a return under I.R.C. §6020(b), the Secretary is then authorized to issue and send a Notice of Deficiency to the taxpayer. The Notice of Deficiency is also called a '90 day letter,' because once a valid Notice of Deficiency is issued I.R.C. §6213 mandates that when a taxpayer is sent a Notice of Deficiency he has 90, or 150 if outside the United States, to file a petition with the Tax Court for a redetermination of the alleged deficiency.

Through this process Congress intended that a valid Notice of Deficiency must be issued and served on a taxpayer before the Tax Court has authority to rule on the IRS alleged deficiencies. Pursuant to I.R.C. §6212(a) the IRS must issue a valid notice of deficiency to the taxpayer before the Tax Court can gain jurisdiction. See *Hempel v. United States*, 14 F.3d 522 (11th Cir. 1994) (holding that the Notice of Deficiency is the jurisdictional ticket to Tax Court). See also *Sealy Power v. Commissioner*, 46 F.3d 382 (5th Cir, 1995) ("Tax Court only has jurisdiction when the Commissioner issues a valid notice and the taxpayer files a petition for redetermination").

Thus, Congress created the United States Tax Court "to provide taxpayers with a means of challenging deficiencies made by the Secretary or the CIR, his

delegate, without first having to pay the alleged deficiency. Without such a forum, taxpayers would have to pay the asserted deficiency and then initiate a suit in federal district court for a refund." *Samuels, Kramer & Co. v. Commissioner,* 930 F.2d 975, 979 (2nd Cir. 1991). As an Article I court, the Tax Court is a court of "strictly limited jurisdiction." *Kelley v. Commissioner*, 45 F.3d 348, 351 (9th Cir. 1995). A notice of deficiency issued by the IRS pursuant to §6212 is the taxpayer's jurisdictional "ticket to the Tax Court." *Bokum v. Commissioner*, 992 F.2d 1136, 1139 (11th Cir. 1993) (quoting *Stoecklin v. Commissioner*, 865 F.2d 1221, 1224 (11th Cir. 1989)); *Spector v. Commissioner*, 790 F.2d 51, 52 (8th Cir. 1986) (citing *Laing v. United States*, 423 U.S. 161, 165 n.4 (1976)), and holding that "the determination of a deficiency and the issue of a notice of deficiency is an absolute precondition to tax court jurisdiction").

In a nutshell, the statutory authority for the Tax Court to have jurisdiction to adjudicate the validity of a tax deficiency determined by the IRS requires a valid Notice of Deficiency being issued pursuant to statutory guidelines. Without a valid Notice of Deficiency the Tax Court lacks jurisdiction. Selgas raised the issue at Tax Court that no determination had been made as the CIR did not make a return pursuant to §6020(b). Without such a return and subsequent determination the Notice of Deficiency was invalid and did not confer jurisdiction on the Tax Court.

The Tax Court rejected his argument and the 5th Circuit confirmed the Tax Court's decision.

2. Certiorari Is Merited Because the 5th Circuit's Decision Below Conflicts with Decisions of This Court.

The 5th Circuit cited *Laing v. United States*, 423 U.S. 161, 174 (1976) for the statement "Where there has been

no tax return filed the tax deficiency is the amount of tax due." This statement was taken out of context. Because of the misunderstanding of the 5th Circuit regarding the holding of the *Laing* court, its decision is in direct conflict with another Supreme Court decision. While the Laing court did make the forgoing statement it was not a general statement applying to all situations. In context, the statement was in relation to a particular section of the code, §6851 which made an exception to the normal deficiency procedure because the tax due under §6851 was "due immediately upon termination." This exception is not applicable in Selgas' case.

Furthermore, any decision that uses the statement in *Laing* out of context, will be in direct conflict with at least two other Supreme Court decisions. The Supreme Court in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 17 (1983) expressed its extreme reluctance to deviate from the principle that the language used by Congress is the intent of Congress. Accordingly, the Supreme Court will not interpret a portion of one statute taken out-of-context and apply it in such a manner as to render another portion of a statute superfluous, ineffective and unnecessary, This principle was made even more firm in *Freytag v. Commissioner of Internal Revenue,* 501 U.S. 868, 873 (1991) wherein the Court stated that, "When we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances." *Freytag* also reaffirmed at page 874 that "courts 'are not at liberty to create an exception where Congress has declined to do so.'"

Selgas filed returns that were not signed. This made them non-processable. In effect, it was the same as if he had not filed the returns. In such a situation §6020(b) becomes applicable. To claim no return is required in the case which has not been an exception by Congress is to

render §6020(b) "superfluous, ineffective and unnecessary."

Congress through its language required a return to be made where no return was filed. Selgas' situation does not conform to any of the exceptions provided by Congress. Accordingly, this Court needs to resolve the misinterpretation of the 5th Circuit regarding *Laing* and review the decision in light of the principles in *Franchise Tax Board* and *Freytag*.

3. The 5th Circuit's Affirming of a Tax Court's Ruling that no Returns are Required by the Secretary Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings and Has Sanctioned Such a Departure by the Tax Court as to Call for an Exercise of This Court's Supervisory Power.

A incredulous set of circumstances was presented by the CIR at the Tax Court. In an effort to by-pass the clear language of §6020(b) the CIR clams to have attached to the Notice of Deficiency a Form 13496.

The government answered the Petition and claimed that the Notice of Deficiency included, in addition to the two page notice, the unsigned agent's report (Form 4549) and a document entitled 'IRC Section 6020(b) Certification' (Form 13496). These additional documents were attached to the governments Answer to the Petition. Just prior to trial, Selgas stipulated that he received the invalid document purporting to be a Notice of Deficiency with the unsigned agent's report. But he did not stipulate to receiving the 6020(b) Certification document.

According to the CIR the Form 13496 and its accompanying documents were supposed to substitute for a return. The Tax Court accepted that argument.

What makes the argument incredulous is the testimony of the IRS paralegal allegedly confirming the existence of the form. According to the CIR, in its Appellee Brief, a paralegal testified at trial that "the Commissioner would, ***in the ordinary course of business*** attach that document to a notice of deficiency issued in a case like this where there is no record of receiving a return from the taxpayer." (Emphasis added). The alleged 13496 form that the paralegal was referring to was claimed to have been dated in July of the year 2004.

It would have been legally impossible for the paralegal to be truthfully testifying to the existence of the form 13496 in July of 2004 as a document used in the ordinary course of business when the document was not authorized until July 18, 2005.

The Tax Court on page 3 of its Bench Order delivered on November 2, 2005 specifically found that the Certification was in fact attached to the original Notice of Deficiency as claimed by the government.

The Tax Court relied on testimony by an IRS employee that "it was in keeping with its normal practice of preparing SFRs when the taxpayer has not filed." This statement by the IRS could not be true either factually or legally. The IRC Section 6020(b) Certification could not have been a part of the normal practice of the IRS procedures. The form was not even proposed until July 18, 2005. The Form 13496 first appeared in a temporary regulation in the Federal Register on July 18, 2005, see Fed. Reg. Vol. 70, No. 136, Monday, July 18, 2005, at page 41165.

Further temporary regulations regarding the 6020(b) Certification and the rational behind the temporary regulation can be found at Fed. Reg. Vol. 70, No. 136, Monday, July 18, 2005, pp 41144-46. Since the IRC

Section 6020(b) Certification otherwise known as Form 13496 was not legally available until July, 18, 2005, it could not have been used, either physically or legally on July 18, 2004.

Furthermore, by the IRS' own official announcement, the effective date of the use of the Form 13496 was not until July, 18, 2005. On September 6, 2006 the Commissioner issued Internal Revenue Bulletin, 2005-36, T.D. 9215. In relation to the regulations regarding the use of the Form 13496, also called IRC Section 6020(b) Certification the Deputy Commissioner, Mark E. Matthews, specifically stated the effective date of the rules governing the use of the Form 13496. The first indication of an effective date was in the introductory material wherein it was stated, "*Effective Date*: These regulations are effective July 18, 2005." The second warning of an effective date was at the conclusion of the Bulletin wherein it was stated, "This section applies to returns prepared under section 6020 after July 18, 2005." Thus, by the government's own official admission, the Form 13496 did not apply to returns prepared by the IRS until July, 18, 2005. Since the Form 13496 submitted as an alleged substitute for return was dated July 19, 2004, one year before it was deemed effective, it was clearly not authorized.

In face of the fact that the Form 13496 did not exist until one year after it was allegedly attached to a Notice of Deficiency, the tax Court found her testimony credible and ruled that a substitute for return was in fact prepared. The 5th Circuit ignored the argument in favor of the erroneous belief that no return was required at all.

The CIR clearly was attempting to by-pass the clear meaning of the laws passed by Congress, specifically, §6020(b). In essence the CIR was taking the position it was above the law passed by Congress and it could make

its own law. The Tax Court allowed it and the 5th Circuit did nothing to prevent it.

It should be noted, contrary to the government's position and the approval of it by the Tax Court and the 5th Circuit, the CIR is not above the law. The case of *Olpin v. Commissioner*, 270 F.3d 1297, 1300 (10th Cir. 2001) sets forth a very strong legal principle that is being ignored. It states, "The Supreme Court has stated that 'explicit statutory requirements [ ] must be observed and are beyond the dispensing power of Treasury officials.'" Quoting from *Angelus Milling Co. v. Commissioner*, 325 U.S. 293, 296 (1945) and citing *Lucas v. Pilliod Lumber Co.*, 281 U.S. 245 (1930). In other words, neither the IRS officials nor the courts can ignore the requirements of the Code.

For the foregoing reasons the Supreme Court needs to exercise its supervisory powers over the 5th Circuit and the Tax Court and remind both courts that the laws passed by Congress are to be complied with. This applies even to the CIR.

B. Sub-issue 2.

A Notice of Deficiency is not valid if it is issued and sent by a person that does not have the delegated power to issue and send it.

1. Factual Background.

In his Motion for Summary Judgment Selgas raised the undisputed fact that the document purporting to be a Notice of Deficiency received by Selgas was not issued, sent or signed by a person with delegated authority to issue and send the notice. Selgas specifically noted at Footnote #2 on page 2 of the Motion for Summary Judgment that the purported Notice of Deficiency was not properly signed in accordance with Delegation Order 4-8. In Exhibit 1, attached to the Motion for Summary Judgment Selgas explained in great detail that the person

signed the purported Notice of Deficiency was not authorized to either issue the notice, or to send it.

The purported Notice of Deficiency was signed by a Timothy A. Towns from the Compliance Center in Ogden, Utah. Pursuant to a FOIA request made by Selgas, it was discovered that Timothy A. Towns was, at the time of the alleged signature on the Notice of Deficiency on September 14, 2004, a "Supervisory Program Analyst."

Selgas included in Exhibit 1 of his Motion for Summary Judgment, at page 7, the entire Delegation Order 4-8. It reads,

> **Delegation Order 4-8** (Formerly DO-77, Rev. 28)
>
> 1. Authority to Issue Notices of Deficiency and/or Execute Agreements to Rescind Notices of Deficiency
> 2. Authority: To sign and send to the taxpayer by registered or certified mail any notice of deficiency.
> 3. **Delegated to**: Appeals Team Managers and Appeals Team Case Leaders (as to their respective cases); Large and Mid-Size Business (LMSB) Territory Managers; Small Business/Self-Employed (SB/SE) Field Directors: Accounts Management and Submission Processing; Campus Department Managers in SB/SE Compliance Services; SB/SE Compliance Field Territory Managers; SB/SE Technical Services Revenue Agent Reviewers **GS-12** and Tax Compliance Officer Reviewers **GS-09**; Tax Exempt/Government Entities (TE/GE) Reviewers **GS-12**; Wage & Investment (W&I) Directors: Accounts Management, Field Compliance Services and Submission Processing; W&I Territory Managers.

Delegated Order 4-8 specifically authorizes certain persons or offices to "sign and send to the taxpayer by registered or certified mail any notice of deficiency." It will be noted that a 'Supervisory Program Analyst' is not one of the persons with delegated authority to sign and send a notice of deficiency.

The government failed to dispute this fact with any evidence at all. Instead, the government responded in its response to the Motion for Summary Judgment by claiming that Towns' position was equivalent to a Department Manager. The claim was not supported by any evidence or legal authority whatsoever.

Exhibit D of Selgas' Motion for Summary Judgment contains a detailed description of Towns' position as a Supervisory Program Analyst. In general, his position involves advising the Director and other top management officials. There is no mention in the entire job description of a Supervisory Program Analyst having any contact with taxpayers, directly or indirectly. The Supervisory Program Analyst's job is to direct programs, not deal with taxpayers. A Supervisory Program Analyst is simply not a person or office listed in Delegation Order 4-8.

2. Certiorari Is Merited Because the 5th Circuit's Decision Below Conflicts with Decisions of This Court.

As a preliminary matter, it should be noted that it is well-settled law that government agents must operate within the confines of their authority. The Supreme Court in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947), noted the clear duty and long standing principle that persons dealing with the government must verify the authority being exercised. The Supreme Court stated,

"Whatever the form in which the government functions, anyone entering into an arrangement

> with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power, and this is so even though, as here, the agent himself may have been unaware of the limitations of his authority." Id 332 U.S. at 384.

In other words, the source of an agent's authority or an agency's power is derived from two sources: that authority explicitly determined by statute passed by Congress or that authority that has been provided through delegation. If either of these two sources are lacking, the authority exercised is void. Selgas contends that the Notice of Deficiency is invalid in that it lacks authoritative power from both sources.

As a matter of law, it is essential for a federal employee to possess delegated authority to perform any particular act. The absence of delegated authority means that the act in question was beyond the scope of the employee's duties, and therefore unlawful.

Selgas presented in his Appellant Brief a wealth of cases that illustrate the necessity for a public employee to possess delegated authority.

The Supreme Court has held that the rules regarding the necessity for a government employee to have delegated authority to act apply with equal force in the field of tax law. In *Botany Worsted Mills v. United States*, 278 U.S. 282, 288-289, (1929), the mills and a subordinate revenue agent entered into an informal compromise agreement regarding the tax liability of the mills. That agreement was held invalid on the ground that the agent lacked delegated authority to make the agreement. See also *Louisiana Pub. Svc. Comm'n v. FCC*, 476 U.S. 355,

374 (1986), ("an agency literally has no power to act ... unless and until Congress confers power upon it").

The fact that a federal employee must operate within his delegated authority is not a new concept to the 5th Circuit. In *Ferguson v. F.D.I.C.*, 164 F.3d 894, 898 (5th Cir. 1999) the 5th Circuit adopted the *Federal Crop Ins. Corp.* principle and added "[T]hose who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." Citing *Heckler v. Community Health Services*, 467 U.S. 51, 63 (1984).

The Delegation Order, in its essence, is a jurisdictional boundary, just like that between the appellate courts of the 9th Circuit and the 5th Circuit. Both courts are equivalent, yet their jurisdictions are separate and distinct. Jurisdictional boundaries prohibit the 9th Circuit from reviewing a decision from a district court in the 5th Circuit.

All these cases point to the same conclusion, that as a matter of law, when an agent has no delegated authority to act and he does so, his act is void. Congress explicitly authorized the Secretary to send a notice of deficiency under I.R.C. §6212. That authority was delegated to certain offices or officers through Delegation Order 4-8. Delegation Order 4-8 did not include a "Supervisory Program Analyst." Timothy Towns had no delegated authority to issue and send a notice of deficiency. His acts of signing and sending the notice were void, thereby making the Notice of Deficiency sent to Selgas invalid. Since the Notice was invalid the Tax Court lacked jurisdiction.

ISSUE II

Lacking any support in the record, can the Tax Court and the Appellate Court, by implication, consider a statement in a brief submitted by the

government that claimed a person holding an office equivalent too but lacking the actual delegation of authority to be equivalent was permitted to issue and send a Notice of Deficiency?

A. Background.

As was set forth in detail in the previous sub-issue, Selgas challenged the jurisdiction of the Tax Court through a Motion for Summary Judgment. One of the reasons Selgas argued that the Tax Court lacked jurisdiction was that the purported Notice of Deficiency sent to him was not issued and sent by a person with the proper delegation of authority.

The CIR responded to the challenge in it response to the Motion for Summary Judgment by stating that the particular individual, Timothy A. Towns had authority to issue the notice. In it brief the CIR statement that even though the office which Towns occupied was not on the list set forth in Delegation Order 4-8, his office was nevertheless equivalent to the office of a Campus Department Manager. Accordingly, in the CIR's view Towns was authorized to issue and send the Notice of Deficiency. The CIR offered no legal authority for its position, nor did it submit any documentation supporting its conclusion. It was simply a statement made out of thin air with no record evidence to support it.

The Tax Court basically ignored the issue when it ruled on the Motion for Summary Judgment by side-stepping it. It ruled that a signature was not required to render a Notice of Deficiency valid. Later, when Selgas renewed the challenge in his Motion to Vacate, the Tax Court implicitly accepted the CIR when it denied the motion without comment. The 5th Circuit considered the CIR argument when it reached its decision to uphold the validity of the Notice of Deficiency.

B. Certiorari Is Merited Because the 5th Circuit's Decision Below Conflicts with Decisions of Other Circuit Courts.

The circuit courts that have addressed the issue of whether a court may consider non-record evidence or statement made in parties' brief not supported by the record has universally rejected such consideration. The following are circuit court cases to which the 5th Circuit is in conflict.

1.) *Duha v. Agrium, Inc.*, 448 F.3d 867, 879 (6th Cir. 2006) ("Arguments in parties' briefs are not evidence.");
2.) *McClendon v. Indiana Sugars, Inc.*, 108 F.3d 789, 795 (7th Cir. 1997) ("Evidence that was not proffered to the district court in accordance with its local rules is not part of the appellate record; it has no place in an appellate brief.);
3.) *Killen v. Reed & Carnick,* 105 F.3d 669 (10th Cir. 1997) ("Defendants' motion to strike nonrecord matter is GRANTED.");
4.) *Diversified Numismatic, Inc v. City of Orlando, FL,* 949 F.2d 382, 384 (11th Cir. 1991) ("We agree that appellants should not have referenced material not in the record, and we will not consider any non-record evidence or arguments [based] on non-record evidence.");
5.) *Riley v. City of Montgomery, Ala.*, 104 F.3d 1247, 1251 (11th Cir. 1997) ("We grant Defendants' motion [to strike] for those portions of Plaintiff's brief which refer to 'evidence' that is not in the record."); and
6.) *Whitsell v. Office of Personnel Management,* 135 F.3d 777 (Fed. Cir. 1998) (Neither of the newly submitted documents, however, was introduced into evidence or otherwise presented to the administrative judge or the full Board, and the parties have not argued that those documents are

> subject to judicial notice. We therefore have not considered those non-record materials in deciding this case.");

Finally, the 2nd Circuit illustrates the fundamental error in considering non-record evidence. In *Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1127-1128 (2nd Cir. 1989), the court stated, "The merest novice in the law knows that "[f]actual statements contained in a party's brief are not a part of the record." Citing *Matter of Frank Fehr Brewing Co.*, 268 F.2d 170, 183 (6th Cir.1959); and *Bono v. United States*, 113 F.2d 724, 725 (2d Cir.1940).

Thus, it is clear that the 5th Circuit's consideration of non-record evidence contained in the CIR's brief that were not supported by record evidence was error and in conflict with other circuit decision.

CONCLUSION

Seglas has show shown that the 5th Circuit's decision against him in conflict with several decisions of this Court and in conflict with other circuit decisions. Selgas has also shown that the decision of the 5th Circuit has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the Tax Court as to call for an exercise of this Court's supervisory power. Accordingly, the Supreme Court must grant the Petition for a Writ of Certiorari.

Respectfully Submitted on this 15th Day of June, 2007.

/s/ Charles E. McFarland
Charles E. McFarland, Ohio bar # 31808
338 Jackson Road
New Castle, Kentucky 40050
(502) 845-2754, mcfarlandc@bellsouth.net

Attorney for the Petitioner

APPENDIX A

Docket No. 23425-04.

United States Tax Court Washington, DC 20217
THOMAS DRENNAN SELGAS, Petitioner
v.
Commissioner of Internal Revenue, Respondent

DECISION

This case was tried on November 1, 2004, at the Court's trial session in Dallas, Texas. The Court's opinion, including oral findings of fact, is recorded in the transcript of the proceedings before Judge Mark V. Holmes at Dallas, Texas, on November 2, 2005. Following that opinion, it is

ORDERED that there is a deficiency in income tax, and an addition to tax, due from petitioner as follows:

Year	Deficiency	Additions to Tax Under Sec 6651(a)(1)
2002	$23,303	$592.20

/s/ Mark V. Holmes
Judge

ENTERED: NOV 23, 2005

APPENDIX B

Docket No. 23425-04.

United States Tax Court Washington, DC 20217

In the matter of:
THOMAS DRENNAN SELGAS, Petitioner
v.
Commissioner of Internal Revenue, Respondent

ORAL FINDINGS OF FACT AND OPINION

Room 591
Terminal Annex Building
207 S. Houston Street
Dallas, Texas

Wednesday,
November 2, 2005

The above-entitled matter came on for bench opinion, pursuant to notice, at 9:35 a.m.

BEFORE: HON. MARK V. HOLMES
Judge

APPEARANCES:
On behalf of the Petitioner:
NONE

On behalf of the Respondent:
AUDREY M. MORRIS, ESQ.
IRS District Counsel
4050 Alpha Road, 13th Floor
Dallas, Texas 75244

Bench Opinion by Judge Mark V. Holmes

The Court has decided to render oral findings of fact and opinion, and the following represents the Court's oral findings of fact and opinion:

This bench opinion is made pursuant to the authority granted by Section 7459(b) of the Internal Revenue Code of 1986 as amended and Rule 152 of the Tax Court's Rules of Practice and Procedure.

Mr. Selgas was a resident of Texas at the time he filed the petition. There were facts stipulated which are found.

BACKGROUND

This case began because the IRS noticed that it had no record of Mr. Selgas filing a federal income tax return for the tax year 2002. During that year, Mr. Selgas had worked for a company called Chip Data, Incorporated, and during that year Chip Data had issued Mr. Selgas wages in the amount of $104,278 that it reported to him on the annual Form W-2 for that year. It also withheld from his wages federal income tax in the amount of $21,314.62.

Mr. Selgas and the Government stipulated that during 2002, he also received $50 in interest income from the Community Credit Union, $11 in dividends from Deutsche Bank Securities, Incorporated, and had withheld from interest at the Community Credit Union $15 for federal income taxes.

On July 19, 2004, after noticing that no return had come from Mr. Selgas, the Commissioner sent to him a letter, accompanying a Form 4549, Income Tax Examination Changes, associated schedules of computations and a Form 886-A, Explanation of Items. It stated in boldface on the letter accompanying these forms, "We have not received your federal income tax return, and we need you to file your return." The package was signed by an IRS employee.

Moreover, although this is a contested fact, I specifically find that attached to this combination of letter and Forms 4549 and 886-A was another IRS form

entitled, IRC Section 6020b Certification on IRS Form 13496 that was signed by an IRS employee. I make this finding because the IRS established that it was in keeping with its practice of preparing SFRs when the taxpayer has not filed.

Moreover, it was found in the administrative file attached as well to the notice of deficiency that was later issued. However, in this letter, it does state, "The officer of the IRS identified below, authorized by delegation order 182, certifies the attached pages constitute a valid return under Section 6020b. This return consists of the following items: (1) a copy of the Form 1040 which the IRS used to establish the taxpayer's account on its computer system, or alternatively a transcript of account reflecting the entry of data used to establish the taxpayer's account on the IRS computer system;

"(2) Form 4549, Income Tax Examination Changes; (3) Form 866-A, Explanation of Items; and (4) this certification Form 13496. Pursuant to Section 6651(g)(2), this certification with attachments shall be treated as the return filed by the taxpayer for purposes of determining the amount of the additions to tax under paragraphs 2 and 3 of Section 6651(a)."

I do note -- and there's little dispute -- that there was no Form 1040 attached to this package, and there also appears to have been no transcript of account. But the letter itself was found both in the administrative file and, as I said, attached to this July 19 letter, as well as the September 14 notice of deficiency, so I do find that it was sent and that it was sent as part of this package.

As it turns out, it's not all that important that a substitute for return prepared under 6020b was filed at all, but I'll get to that a little bit later.

On September 14, 2004, the IRS sent a notice of deficiency, proposing a deficiency of $23,303, together with an addition to tax for failure to file of $592.20. The discerning listener will hear that this is considerably less than 25 percent of the deficiency amount of more than

$23,000. This is because under Section 6651(b), the penalty is only assessed on the net amount due after taking into account, among other things, the withholding credit that Chip Data, Mr. Selgas's employer, had already withheld from his wage income.

Attached to this notice of deficiency was another copy of the July 19 forms, including, I specifically find, the 6020b certification. Mr. Selgas's reaction to this was to timely file a petition for redetermination of the deficiency.

In his petition, he challenged the notice of deficiency on several grounds: first, alleging that the tax had been fully paid; second, that it was based on a naked assessment with a lack of valid supporting evidentiary documents necessary and required to "verify and support transaction codes, document codes, and blocking codes listed in the individual master file";

Third, that the administrative record was tampered with and that the IRS's computer systems had severe programming bugs; four, that the IRS computer data entry control notices to administer Petitioner's administrative file were nonexistent or missing; fifth, that the Petitioner was not engaged in excisable activities; sixth, that he wasn't involved in self-employment activities; and perhaps most remarkably, seventh, that he is not nor was gainfully employed despite the receipt of over $100,000 in wage income from his employer during the year in question.

Now, several of these grounds are obviously frivolous. Transaction codes have nothing to do with the calculation or challenge to the deficiency amount. Mr. Selgas elaborated in a lengthy reply to the Government's answer in this case with even more grounds for challenging the deficiency, saying that the alleged notice of deficiency is incomplete and unsigned, not signed by somebody with delegated authority; that the Commissioner had failed to identify a particular taxing statute in implementing regulation from which a

deficiency could arise; that the Commissioner had failed to create a valid substitute for return.

Again, many of these are staples of tax protester practice. Others are apparently of Mr. Selgas's own invention, but few if any of them have anything to do with a challenge to the deficiency as calculated by the Commissioner.

In the course of trial preparation, Mr. Selgas did not cooperate with the Government in drafting stipulations, instead coming up with a purported amended return, arguments based on non-delegation of the Secretary's power, and similar nonsubstantive reasons to oppose the deficiency.

After his summary judgment motion was denied shortly after the calendar call, however, a conversion seems to have occurred, and he began to cooperate with the stipulation process, ultimately signing a stipulation in the regular form.

It was a more focused attack on the deficiency, raising three grounds: still, that he had fully paid the tax amount due; second, a new argument that he had sent in not one but two returns before the substitute for return had been issued by the Commissioner; and, three, that the substitute for return that had been prepared by the Commissioner was invalid. Trial was held in Dallas.

DISCUSSION

Point number one, Mr. Selgas's argument that he had fully paid his tax. The records of the IRS do reflect withholding, so Mr. Selgas, in effect, does get the benefit of the withholding from his wages by Chip Data and from the smaller withholding of interest payment from his credit union, and the IRS is, of course, obliged, as its counsel recognizes, to credit these in due course after the deficiency is determined.

But Mr. Selgas did not proffer any proof that he had paid the remainder of the amount that was owed. He had no checks, no money order receipts, no receipts for cash payments to the IRS. Instead, he pointed to his

individual master file transcript which showed zero assessment. But, of course, it would show zero assessment. That's what it should show when a non-filer timely petitions for a redetermination after reviewing and receiving his notice of deficiency based on a substitute for return, which is precisely what Mr. Selgas did here.

My conclusion then, on this first point, is that his tax was not, in fact, fully paid.

His second attack on the deficiency is that he really, really did send in returns, not once but twice. These were attached to the stipulation of facts as Exhibits 1-P and 2-P. These are different returns. They differ a bit in the amount that was owed. They differ in the preparer who signed allegedly at the bottom of page 2 of each of the returns. Neither of these purported returns is signed or dated by either Mr. or Mrs. Selgas.

Were these returns, in fact, filed? There are at least three reasons that I find that they were not. First, Mr. Selgas never mentioned these before. Having been sent IRS forms that say he did not receive -- that they had not received any income tax return for the year 2002 and having participated in very lengthy pretrial maneuvering, to come up only on the Monday of the calendar call with additional returns allegedly filed is quite beyond belief.

Second, and perhaps more importantly, neither one was ever received by the IRS. This means they're not regarded as filed under Section 7501. Mr. Selgas presented no proof of mailing by certified or registered mail or the other ways he could establish that a return should be regarded as filed by the IRS.

Third, there's no signature on either of these returns, as I've already said. Section 6061 generally requires a signature on a return form for that return form to become a legal return. Now, Mr. Selgas explained that he did execute a power of attorney, and, in fact, in some circumstances, someone receiving a power of attorney can execute a return for a non-signer.

Regulation 1.6061-1(a) states, "Each individual shall sign the income tax return required to be made by him, except that the return may be signed for the taxpayer by" -- and this is important -- "an agent who is duly authorized in accordance with paragraph (a)(5) or (b) of Section 1.6012-1 to make such return."

Turning to that section of the regulations, we see that in regulation 1.6012-1(a)(5), titled, Returns made by agent, that "the return of income may be made by an agent if, by reason of disease or injury, the person liable for the making of the return is unable to make it. The return may also be made by an agent if the taxpayer is unable to make the return by reason of continuous absence from the United States, including Puerto Rico, as if it were a part of the United States, for a period of at least 60 days prior to the date prescribed by law for making the return.

"In addition, a return may be made by an agent if the taxpayer requests permission in writing of the district director for the Internal Revenue district in which is located the legal residence or principal place of business of the person liable for the making of the return and such district director determines that good cause exists for permitting the return to be so made...

"Whenever a return is made by an agent, it must be accompanied by a power of attorney or copy thereof, authorizing him to represent his principal in making, executing or filing the return. A Form 2848, when properly completed, is sufficient."

Needless to say, Mr. Selgas presented no proof that he was diseased or injured and so unable to file a return, nor that he was outside the United States. Instead, he argued that he had a power of attorney, though no proof that he had secured consent from the Service to file with a signature from a power of attorney, because he had given the power of attorney, he said, to an IRS employee. He presented no proof of this, no copy of a power of attorney form.

And, of course, a Form 2848 as well as general principles of common law don't allow you to designate an agent without that agent's consent, and there certainly was no proof of consent that this particular IRS employee, whose name Mr. Selgas even had trouble remembering, had ever consented to be Mr. Selgas's agent for the purpose of signing either of his two returns.

Finally and more generally, I observed Mr. Selgas. I don't find him to be credible in the least on any important part of his testimony and specifically on this return story. I simply find him to have lied.

Part three of his attack was on the invalidity of the substitute for return. His argument here is that the requirements for a substitute for return were not met. There are two points that I want to make here. One was that I do find that the substitute for return here was valid.

Section 6020b of the Code states, "If any person fails to make any return required by any Internal Revenue law or regulation made thereunder at the time prescribed therefor, or makes willfully or otherwise a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise." The second subpart says, "Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes."

Mr. Selgas's argument is that because there was no Form 1040 prepared by the Commissioner and no regulation authorizing the Commissioner's activities promulgated under 6020, that there can be no substitute for return in his case. But, of course, the authority for the Commissioner's actions were in the Code, not the regulation, and there is certainly nothing in Section 6020b that requires a 1040 specifically.

The requirements for a valid substitute for return have been the subject of some commentary in the case law, and one of the leading cases in the Tax Court is

Cabirac v. Commissioner, which is 120 TC 163 (2003), which contains a brief discussion of the requirements and the development of those requirements of a valid SFR or substitute for return.

Specifically I'll give a quote from Cabirac which cites, in turn, to a previous case, Milsap v. Commissioner. "In Milsap v. Commissioner, 91 TC 926, the Respondent prepared Forms 1040 containing the taxpayer's name, address, Social Security number and filing status. The Forms 1040 contained no information regarding income or tax and were not subscribed. However, attached to the Forms 1040 was previously-prepared revenue agent's report which contained sufficient information from which to compute the taxpayer's tax liability and was subscribed. We held that the 1040, together with the attached revenue agent's report, met the requirements for a Section 6020b return."

Now, in Cabirac, the revenue agent's report which contained the information from which the taxpayer could calculate his taxes was not attached, and so in Cabirac, the purported substitute for return was held not to be valid. But from this line of cases, I derive the following three things that have to be in a substitute for return for it to be considered a valid substitute for return under Section 6020b: one, that the taxpayer has to be identified; two, that there has to be an explanation of the basis for the computation of the deficiency; and, three, that it has to be signed by an IRS employee with appropriate authority.

Each of those three elements are met here. In Exhibit 6-R and 7-R which, again, I have found was attached to 6-R originally, are Mr. Selgas's name, Social Security number, accurate mailing address and such, and a long explanation of the basis of computation based on the third-party information that the IRS had, and the last page, which was, in fact, signed by an IRS employee.

The second reason that I find Mr. Selgas's argument to be an inadequate attack on the notice of

deficiency is that here I don't think a substitute for return even matters. The Commissioner can issue a notice of deficiency without a substitute for return, and the Commissioner can even assert the addition to tax that he asserts here under Section 6651(a)(1), the addition to tax for failure to file, without a substitute for return. It's Section 6651(a)(2), the failure to pay tax owed as shown on a return, that can be a problem if there isn't a valid substitute for return, but that's not the situation here.

So my conclusion is that I find for Respondent as to the following deficiency and addition to tax: for the tax year 2002, $23,303, with an addition to tax under Section 6651(a)(1) of $592.20.

This concludes the Court's oral findings of fact and opinion in this case.

(Whereupon, at 9:57 a.m., the bench opinion in the above-entitled matter was concluded.) Certificate of Transcriber and Proofreader

ON THE RECORD REPORTING, INC.

Case Docket No. 23425-04

Case Name Thomas Drennan Selgas

We, the undersigned, do hereby certify that the foregoing pages, numbers 1 through , inclusive, are the true, accurate, and complete transcript prepared from the verbal recording made by electronic recording by Barbara Wall on November 2, 2005, before the United States Tax Court at its session in Dallas, Texas, in accordance with the applicable provisions of the current verbatim reporting contract of the Court, and have verified the accuracy of the transcript by comparing the typewritten transcript against the verbal recording.

	Anita Tyler	11/03/05
(Signature Transcriber)	(Transcriber Name)	(Date)
	Laurel H. Stoddard	11/04/05
(Signature Proofreader)	(Proofreader Name)	(Date)

APPENDIX C

Docket No. 23425-04.

United States Tax Court Washington, DC 20217

In the matter of:
THOMAS DRENNAN SELGAS, Petitioner
v.
Commissioner of Internal Revenue, Respondent

TELEPHONE CONFERENCE TRANSCRIPT

Telephone Conference between:
Judge Mark V. Holmes;
Abbey Garber, Assoc Counsel;
Thomas D. Selgas, Petitioner
John O'Neill Green, Counselor;
Tuesday,
August 9, 2005

The above-entitled matter came on for a conference call pursuant to notice, at 9:48 a.m.

BEFORE: HON. MARK V. HOLMES
Judge

APPEARANCES:
U:
THOMAS D. SELGAS, Petitioner, Attorney Pro Se
JOHN O'NEILL GREEN, ESQ., CO-COUNSEL

On behalf of the Respondent:
ABBEY B. Garber, ESQ.
Internal Revenue Service
4050 Alpha Road, 13th Floor
Dallas, Texas 75244

THE COURT: OK, what documents to you think you're missing from the record?

SELGAS: Um, well, the returns that according to everything I know, have been told, and then also according to, like, the individual master file and stuff that were filed by my former attorney, um, were not produced. Um, there was a thirty-day letter, um, I don't know what you call it, um, a thirty-day.

COURT: Yeah, they're called thirty-day letter (unintelligible). What's the full title, Notice of

SELGAS: Well there was a memorandum attached to it

COURT: Notice of Deficiency, or something like that

SELGAS: There was a memorandum attached to it that said it was illegal and what was produced yesterday, there's a hand note that says that that thirty-day letter that was send to me was illegal. And then, um, there was a letter that I saw the last time from, uh, a former attorney, Baxley, dated December 12, 2001, that's no longer there, but there was a letter from Revenue Agent McClain acknowledging receipt of that letter that we got a copy of yesterday.

COURT: Eh, do you, why don't you have copies of returns that were filed on your behalf in your own possession?

SELGAS: Um, they were never sent to me, Your Honor.

COURT: Did you try to retrieve them from the attorney who filed them on your behalf?

SELGAS: Um, yes Your Honor. And he said that the IRS took them when they came and, I guess, either raided their office, or whatever the term was. So he doesn't have them.

COURT: Eh (unintelligible)

SELGAS: Pardon?

COURT: What's the lawyer's first name, Milton?

SELGAS: Yes, sir.

COURT: (unintelligible), Mr. Garber?

GARBER: (unintelligible), Your Honor.

COURT: Do you know Mr. Baxley's whereabouts, sir?

GARBER: I do not, although he (unintelligible) more familiar with it than I am (unintelligible).

COURT: Has he been the subject of () injunction campaign by the Justice Department? Mutter, mutter. Have you found in the IRS records, Mr. Garber, uh, copies of the tax returns that were filed for the years in issue?

GARBER: Mutter, mutter

COURT: Which in this case is just 2002.

GARBER: I'm not aware of any returns ()

COURT: Are the returns that you say were filed in your behalf by Mr. Baxley, this is directed to Mr. Selgas, for the 2002 tax year?

SELGAS: Uh, there were returns for '97, '98, '99, 2000, 2001 and 2002, Your Honor.

COURT: Is there anything in the administrative record, Mr. Garber, that would indicate where these returns are?

GARBER: No, Your Honor, (unintelligible)

SELGAS: Your Honor, if you'll remember, in the last call Ms. Morris admitted that the returns had been filed when I objected that they weren't.

COURT: The question was whether they were process-able or not.

SELGAS: And I, and I, again since I don't have copies, I'd like to see what was filed.

APPENDIX D

No. 06-60311

United States Court of Appeals,
Fifth Circuit.

THOMAS DRENNAN SELGAS,
Petitioner - Appellant,
versus
COMMISSIONER OF INTERNAL REVENUE,
Respondent - Appellee.

Appeal from the United States Tax Court
NO. 23425-04

Before SMITH, WIENER, and OWEN, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Thomas Selgas received a notice of deficiency from the Internal Revenue Service ("IRS") and petitioned for redetermination of his tax liability. The United States Tax Court entered judgment against Selgas, and he appeals. We affirm.

I.

On July 19, 2004, the Commissioner of Internal Revenue ("the Commissioner") sent Selgas a letter stating that the IRS had not received a tax return from him for 2002. The Commissioner attached a form providing a proposed computation of Selgas's liability based on third-party payer information reflecting wages of $104,278, interest income of $50, and dividend income of $11. The form stated that Selgas was entitled to a standard deduction of $4,700 and a personal exemption of $3,000. The form included a computation showing that Selgas's tax deficiency was $23,303, against which he was entitled to prepayment withholding credits of $21,329, leaving a net

tax liability of $1,974. The form noted that in addition, Selgas owed $592.20 pursuant to 26 U.S.C. § 6651(a)(1) and (2) because he was late in filing his return and in paying the full amount due.

The Commissioner's letter informed Selgas that he could agree to the IRS's proposed examination changes and pay the amount due, respond within thirty days by filing a return, or explain why he had not filed a return and would like the IRS to reconsider. Attached to the letter was yet another form, which informed Selgas, "Your best course of action is to file your own tax return now to claim your credits and deductions as allowed by law."

Selgas made no response.[1] On September 14, 2004, the Commissioner sent him a "Notice of Deficiency" pursuant to 26 U.S.C. § 6212 reflecting a 2002 federal income tax deficiency of $23,303 and a delinquency penalty of $592.20. Attached to the notice were several forms reflecting the same computation and explanation as had appeared in the Commissioner's initial letter as well as a certification by an IRS Operations Manager that the documents attached to the notice of deficiency constituted the return prepared for Selgas by the Commissioner pursuant to 26 U.S.C. § 6020(b). The certification further stated that the return was to be treated as filed by the taxpayer for the purpose of determining the amount of the delinquency penalty. *See* 26 U.S.C. § 6651(a)(2)-(3), (g)(2).

Selgas timely filed a petition in the Tax Court attacking the Commissioner's calculations of the existence and amount of his deficiency on numerous grounds, all of

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[1] Selgas later claimed that he had filed two unsigned tax returns during this period. The IRS did not receive them, and the Tax Court did not find Selgas's testimony on this matter credible. For reasons explained below, even if these returns were filed, they were invalid because they lacked the taxpayer's signature.

which were rejected by the Tax Court. He timely filed a motion to vacate the judgment, which the Tax Court likewise rejected. Selgas asserts three arguments on appeal: (1) that the Tax Court lacked jurisdiction because the notice of deficiency was not promulgated pursuant to a valid delegation of authority; (2) that the decision should be vacated because Selgas was prejudiced by the clerk's failure to transcribe certain routine scheduling conferences involving the parties and the court; and (3) that the Commissioner's calculation was incorrect because Selgas filed documents illustrating that he was entitled to a refund.

II.

Whether the Tax Court had jurisdiction pursuant to a validly issued notice of deficiency is a matter of law that we review *de novo*. *See Portillo v. Comm'r*, 932 F.2d 1128, 1131-32 (5th Cir. 1991). The notice of deficiency sent to Selgas was valid, and the Tax Court appropriately exercised jurisdiction. The Tax Court acquires jurisdiction when a taxpayer files a timely petition contesting a notice of deficiency issued by the Commissioner. *See* 26 U.S.C. § 6213; *Portillo*, 932 F.2d at 1132.

Selgas claims that the court lacked jurisdiction because the notice sent to him was invalid for two reasons: (1) The employee who signed the deficiency notice lacked authority to do so; and (2) the IRS improperly failed to prepare a substitute tax return for Selgas before issuing the notice of deficiency. Selgas's arguments in this vein are irrelevant to the outcome. Citing a delegation order issued as part of the IRS's internal operating procedures, Selgas contends that the Supervisory Program Analyst who signed his deficiency notice lacked authority to act on behalf of the Secretary of the Treasury by issuing the deficiency. The Commissioner states that "Supervisory Program Analyst" is equivalent to Campus Department

Manager, an official who plainly enjoys delegated authority to issue deficiency notices.

As a general matter, IRS internal operating procedures confer no rights on individual taxpayers,[2] but we need not consider this dispute at great length because, in any event, no signature is required to render a deficiency notice valid.[3] A taxpayer is entitled to notice of a deficiency, but the relevant statute does not mandate any particular form of notice or specify any content it must include. *See* 26 U.S.C. § 6212. Like our sister circuits, we conclude that a notice of deficiency is valid as long as it informs a taxpayer that the IRS has determined that a deficiency exists and specifies the amount of the deficiency.[4] The existence of a signature or the identity of any IRS official who provides one, is superfluous.

Likewise, Selgas's argument that the notice of deficiency was invalid because the IRS failed to prepare a proper substitute tax return is meritless. We need not consider whether the substitute return was properly calculated and presented on the appropriate forms because, for the purpose of determining a deficiency, there is no need for the Commissioner to prepare a substitute tax return.[5] "Where there has been no tax return filed the deficiency is

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[2] *See Smith v. United States*, 478 F.2d 398, 400 (5th Cir. 1973); *see also Tavano v. Comm'r*, 986 F.2d 1389, 1390 (11th Cir. 1993).

[3] 3 *See Brafman v. United States*, 384 F.2d 863, 865 n.4 (5th Cir. 1967). *See also Tavano*, 986 F.2d at 1390; *Urban v. Comm'r*, 964 F.2d 888, 889 (1992).

[4] *See Bokum v. Comm'r*, 992 F.2d 1136, 1139 (11th Cir. 1993); *Estate of Yaeger v. Comm'r*, 889 F.2d 29, 35 (2d Cir. 1990).

[5] *See* 26 U.S.C. §§ 6020(b), 6211(a); *United States v. Stafford*, 983 F.2d 25, 27 (5th Cir. 1993) ("[A]lthough [§ 6020(b)] authorizes the Secretary to file for a taxpayer, the statute does not require such a filing.").

the amount of tax due."[6] Nothing about the notice of deficiency sent to Selgas operated to defeat the Tax Court's jurisdiction.

III.

Selgas was not prejudiced by the clerk's failure to record two off-the-record status conferences. Selgas was afforded a fair trial on the merits of the issues he claims were discussed at the status conferences. He was not prejudiced by the clerk's failure to record the Tax Court's "admission," during a status conference, that the IRS possessed two unsigned tax returns entitling Selgas to relief, even assuming that the Tax Court ever made such a statement. In any event, for reasons explained below, the fact that the tax returns were unsigned strips them of any legal effect and renders irrelevant the question whether the IRS ever had them.

IV.

Selgas's claim that the notice of deficiency is inaccurate because he filed two unsigned tax returns illustrating that he was entitled to a refund in 2002 is neither credible nor rele-vant. Selgas first produced these returns at the calendar call for trial of his case in the Tax Court, claiming that he had filed them before the IRS sent him the deficiency notice. The IRS had no record of ever receiving these returns. The trial judge specifically found Selgas's testimony to be incredible on this point and determined that the returns had never been filed. Selgas provides no reason for us to upset that plausible factual determination. Likewise, the Tax Court properly ignored the "corrected amended" return that Selgas filed just before trial, because he supplied no evidence substantiating the deductions and other items on the

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[6] *Laing v. United States*, 423 U.S. 161, 174 (1976). *See also* 26 C.F.R. § 301.6211-1(a).

return that purported to show that he was entitled to a substantial refund.

Even if the returns were filed, the fact that they were unsigned deprives them of legal effect.[7] Selgas claims that he provided power of attorney to the IRS employee who received the return, but, again assuming that this is true, there is no reason to believe that the employee was required to, or even should have, exercised such power and signed the return. That duty lay upon Selgas and, at best, he failed to fulfill it.

V.

Selgas's arguments are utterly lacking in merit and, as an aside, his conduct in this litigation appears to have been inconsistent with that of a litigant endeavoring to aid in the truthful and efficient resolution of contested issues of fact and law. We have no sympathy for Selgas's behavior or his arguments in defense of what appears to have been a brazen attempt to avoid a few thousand dollars in legitimate tax liability. The judgment of the Tax Court is AFFIRMED.

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[7] *See* 26 U.S.C. §§ 6012, 6061(a), 6065; 26 C.F.R. § 1.6061-1(a); *Brafman*, 384 F.2d at 868; *Reaves v. Comm'r*, 295 F.2d 336, 338 (5th Cir. 1961).

APPENDIX E

No. 06-60311

United States Court of Appeals,
Fifth Circuit.

THOMAS DRENNAN SELGAS,
Petitioner - Appellant,
versus
COMMISSIONER OF INTERNAL REVENUE,
Respondent - Appellee.

Petition for Review of an Order of the
Internal Revenue Service (Tax Ct)

ON PETITION FOR REHEARING

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED

ENTERED FOR THE COURT:

/S/ Jerry Smith
United States Circuit Judge

REHG-3

FILED: March 21, 2007
CHARLES R. FULBRIGE III
CLERK

CLERK'S NOTE
SEE FRAP AND LOCAL RULES 41 FOR STAY OF MADATE

APPENDIX F

INTERNAL REVENUE CODE SECTIONS: 6020, 6065, 6201, 6211, 6212, 7701(a)(11)-(12)

CHAPTER 61 - INFORMATION AND RETURNS

Subchapter A - Returns and Records

PART II - TAX RETURNS OR STATEMENTS

Subpart D - Miscellaneous Provisions

****

§6020. Returns prepared for or executed by Secretary

(a) Preparation of return by Secretary

If any person shall fail to make a return required by this titleor by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary may prepare such return, which, being signed by such person, may be received by the Secretary as the return of such person.

(b) Execution of return by Secretary

(1) Authority of Secretary to execute return

If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

(2) Status of returns

Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

PART IV - SIGNING AND VERIFYING OF RETURNS AND OTHER DOCUMENTS

§6065. Verification of returns

Except as otherwise provided by the Secretary, any return, declaration, statement, or other document

required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury.

CHAPTER 63 - ASSESSMENT

Subchapter A - In General

****

§6201. Assessment authority

(a) Authority of Secretary

The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) Taxes shown on return

The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title.

(2) Unpaid taxes payable by stamp

(A) Omitted stamps

Whenever any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale or use by the manufacturer thereof or whenever any transaction or act upon which a tax is required to be paid by means of a stamp occurs without the use of the proper stamp, it shall be the duty of the Secretary, upon such information as he can obtain, to estimate the amount of tax which has been omitted to be paid and to make assessment therefor upon the person or persons the Secretary determines to be liable for such tax.

(B) Check or money order not duly paid

In any case in which a check or money order received under authority of section 6311 as payment for stamps is not duly paid, the unpaid amount may be immediately assessed as if it were a tax imposed by this title, due at the time of such receipt, from the person who tendered such check or money order.

(3) Erroneous income tax prepayment credits

If on any return or claim for refund of income taxes under subtitle A there is an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax, the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary in the same manner as in the case of a mathematical or clerical error appearing upon the return, except that the provisions of section 6213(b)(2) (relating to abatement of mathematical or clerical error assessments) shall not apply with regard to any assessment under this paragraph.

(b) Amount not to be assessed

(1) Estimated income tax

No unpaid amount of estimated income tax required to be paid under section 6654 or 6655 shall be assessed.

(2) Federal unemployment tax

No unpaid amount of Federal unemployment tax for any calendar quarter or other period of a calendar year, computed as provided in section 6157, shall be assessed.

(c) Compensation of child

Any income tax under chapter 1 assessed against a child, to the extent attributable to amounts includible in the gross income of the child, and not of the parent, solely by reason of section73(a), shall, if not paid by the child, for all purposes be considered as having also been properly assessed against the parent.

(d) Required reasonable verification of information returns

In any court proceeding, if a taxpayer asserts a reasonable dispute with respect to any item of income reported on an information return filed with the Secretary under subpart B or C of part III of subchapter A of chapter 61 by a third party and the taxpayer has fully cooperated with the Secretary (including providing, within a reasonable period of time, access to and inspection of all witnesses, information, and documents within the control of the taxpayer as reasonably requested by the Secretary), the Secretary shall have the burden of producing reasonable and probative information concerning such deficiency in addition to such information return.

(e) Deficiency proceedings

For special rules applicable to deficiencies of income, estate, gift, and certain excise taxes, see subchapter B.

Subchapter B - Deficiency Procedures in the Case of Income, Estate, Gift, and Certain Excise Taxes

****

§6211. Definition of a deficiency

(a) In general

For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, and 44 the term "deficiency" means the amount by which the tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44 exceeds the excess of -

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over -

(2) the amount of rebates, as defined in subsection (b)(2), made.

(b) Rules for application of subsection (a)

For purposes of this section -

(1) The tax imposed by subtitle A and the tax shown on the return shall both be determined without regard to payments on account of estimated tax, without regard to the credit under section 31, without regard to the credit under section 33, and without regard to any credits resulting from the collection of amounts assessed under section 6851 or 6852 (relating to termination assessments).

(2) The term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by subtitle A or B or chapter 41, 42, 43, or 44 was less than the excess of the amount specified in subsection (a)(1) over the rebates previously made.

(3) The computation by the Secretary, pursuant to section 6014, of the tax imposed by chapter 1 shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return.

(4) For purposes of subsection (a) -

(A) any excess of the sum of the credits allowable under sections 24(d), 32, and 34 over the tax imposed by subtitle A (determined without regard to such credits), and

(B) any excess of the sum of such credits as shown by the taxpayer on his return over the amount shown as the tax by the taxpayer on such return (determined without regard to such credits), shall be taken into account as negative amounts of tax.

(c) Coordination with subchapters C and D

In determining the amount of any deficiency for purposes of this subchapter, adjustments to partnership items shall be made only as provided in subchapters C and D.

§6212. Notice of deficiency

(a) In general

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44 he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail. Such notice shall include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office.

(b) Address for notice of deficiency

(1) Income and gift taxes and certain excise taxes

In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, or chapter 44 if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, chapter 44, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(2) Joint income tax return

In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice, except that if the Secretary has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last known address.

(3) Estate tax

In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by chapter 11, if addressed in the name of the decedent or other person subject to liability and mailed to his last

known address, shall be sufficient for purposes of chapter 11 and of this chapter.

(c) Further deficiency letters restricted

(1) General rule

If the Secretary has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, of estate tax in respect of the taxable estate of the same decedent, of chapter 41 tax for the same taxable year, of chapter 43 tax for the same taxable year, of chapter 44 tax for the same taxable year, of section 4940 tax for the same taxable year, or of chapter 42 tax, (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical or clerical errors), in section 6851 or 6852 (relating to termination assessments), or in section 6861(c) (relating to the making of jeopardy assessments).

(2) Cross references

For assessment as a deficiency notwithstanding the prohibition of further deficiency letters, in the case of -

(A) Deficiency attributable to change of treatment with respect to itemized deductions, see section 63(e)(3).

(B) Deficiency attributable to gain on involuntary conversion, see section 1033(a)(2)(C) and (D).

(C) Deficiency attributable to activities not engaged in for profit, see section 183(e)(4). For provisions allowing determination of tax in title 11 cases, see section 505(a) of title 11 of the United States Code.

(d) Authority to rescind notice of deficiency with taxpayer's consent The Secretary may, with the consent of the taxpayer, rescind any notice of deficiency mailed to

the taxpayer. Any notice so rescinded shall not be treated as a notice of deficiency for purposes of subsection (c)(1) (relating to further deficiency letters restricted), section 6213(a) (relating to restrictions applicable to deficiencies; petition to Tax Court), and section 6512(a) (relating to limitations in case of petition to Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice. Nothing in this subsection shall affect any suspension of the running of any period of limitations during any period during which the rescinded notice was outstanding.

Subtitle F - Procedure and Administration
CHAPTER 79 - DEFINITIONS
****

§7701. Definitions
(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof -

(11) Secretary of the Treasury and Secretary

(A) Secretary of the Treasury

The term "Secretary of the Treasury" means the Secretary of the Treasury, personally, and shall not include any delegate of his.

(B) Secretary

The term "Secretary" means the Secretary of the Treasury or his delegate.

(12) Delegate

(A) In general

The term "or his delegate" -

(i) when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context; and

(ii) when used with reference to any other official of the United States, shall be similarly construed.

APPENDIX G

Selected FOIA Responses from the
Secretary's Disclosure Office

RESPONSE: To request Petitioner's FOIA Request regarding Timothy A. Towns:

Dear Mr. Selgas:

This is in response to your Freedom of Information Act (FOIA) request dated September 18, 2004, received in our office September 27, 2004.

We have located seven (7) pages of documents in response to your request.

Responsive to Items 1, 5, 8, and 11, we have enclosed the Public Information Listing for Timothy A. Towns.

Regarding Items 2, 6, and 10, the Privacy Act protects information concerning Internal Revenue Service employees. Six items of information have been designated as public information as specified in 5 CFR 293.311. To release information, other than these items designated as public, we must have authorization from the employee. However, we consider the documents and/or information provided in our response to be responsive to your request for Item 2. You are not authorized to receive the information in Items 6 and 10.

The Public Information Listing will contain the following information:
1) Name; 2) Present and past position titles and occupational series; 3) Present and past grades; 4) present and past annual salary rates; 5) Present and past duty stations; and 6) Position descriptions, identification of job elements, and those performance standards (but not actual performance appraisals) that the release of which

would not interfere with law enforcement programs or severely inhibit agency effectiveness.

Responsive to Items 3 and 4, we have enclosed the Appointment Affidavits concerning Mr. Towns. IRS employees take an Oath of Office (appointment affidavit) upon entering the Service. No additional oaths are generally required.

Regarding Item 7, The Commissioner has delegated his authority to various officials in the Internal Revenue Service to administer the various programs of the Service. These delegations may be located in the Federal Register, the Cumulative Bulletin, and the Internal Revenue Manuals (IRM). IRM 1.2.2, Delegations of Authority, contains delegation orders that authorize IRS employees to do specific duties or activities and are generally issued by position or title, and not by employee's name. The Internal Revenue Manuals are available for public inspection in the Internal Revenue Service Public Access Centers and are, therefore, not subject to specific request. Delegation Orders are also available on the IRS website at http://www.irs.qov. Copies of the IRM may be requested by writing to the address shown below. We have, however, enclosed a copy of the position description,

MPD No. 93616.
Internal Revenue Service
FOI Public Access Center
Room 162111R
1111 Constitution Ave. N.W.
Washington, D.C. 20224

No responsive documents were found regarding Item 9.

If you have any questions regarding this correspondence, contact M McKenzie, #7917705121, at (801) 620-7650 between the hours of 7:OO a.m. and 3:30 p.m. Mountain

Time; or write to: Internal Revenue Service, Ogden Campus Disclosure Office, MIS 7000, PO Box 9941, Ogden, UT 84409. Please refer to case control number MM29-2004-06508.

Sincerely,

/s/ JaNean Ellis
JaNean Ellis
Disclosure Officer

Enclosure(s):
Notice 393

INTERNAL REVENUE SERVICE
MODERNIZATION POSITION DESCRIPTION
MPD No. 93616
Page 1

Classification:	GS-343-15
Classification Title:	Supervisory Program Analyst
Organizational Title:	Chief Planning and Analysis
Organizational Location:	Servicewide

Position Information

Competitive Level Code:	2485
Supervisory Code:	2 (Supervisory)
Bargaining Status:	8888 Non Bargaining Unit
Risk Level/ADP:	5N (Moderate Risk/Non-ADP)
FLSA Status:	Exempt
Full-Working Level:	GS-15
Career Ladder PDs:	None

Remarks:
Replaces TPD #98201T as this position is now a permanent position and is reflected on the blueprint. SM1 -This position is a Senior Manager (first level reporting to an executive)

Duties and Responsibilities Approved: 4/10/01
Barbara L. Kelly, Director, Personnel Policy Division
Classification Approved: 4/10/01 Barbara J. McWhirter, Assistant Director, Office of Workforce Transition
Richard Bell, Position Classification Specialist

Supervisory Certification: I certify that this is an accurate statement of the major duties and responsibilities of this position and its organizational relationships. and that the position is necessary to carry out government functions for which I am responsible. This certification is made with the knowledge that this information is to be used for statutory purposes relating

to appointment and payment of public funds. and that false or misleading statements may constitute violations of such statutes or their implementing regulations.

Signature and Title of Immediate Supervisor: Date:
All other levels of supervision which propose or approve official statements of duties and responsibilities are attesting to the same effect as the immediate supervisor.

This position description is intended for use without modification. Any changes (e.g., pen-and-ink) to the duty statements, factor level descriptions and benchmarks may jeopardize the classification allocation. Contact the National Classification Center for further assistance. The classification of this position may be appealed. Published standards or other information upon which the classification is based may be reviewed. Information may be obtained from the employee's immediate supervisor or the National Classification Center.

Page 2
Introduction
The incumbent functions as the Chief Planning and Analysis. Participates with the other third level management team that is accountable for all programs under the jurisdiction of the Director. The incumbent is responsible for high level, cross-functional projects, often of a confidential nature, and may be delegated the authority to implement, manage, and evaluate special programs and projects Serves as the service-center pathfinder and expert and will be called upon to participate in policy and decision making activities on behalf of the Director. In addition, the incumbent provides program direction to a diverse staff of program analysts.

Knowledge Required
Comprehensive knowledge of IRS mission, organization, policies, practices and procedures, including the program areas of the Director.

Extensive knowledge of the service center organization, policies, practices and procedures, functional programs, operations, and processes assigned to the Director.

In-depth knowledge of advanced management principles, theories, and practices and their applicability to IRS programs, functions, and objectives.

Expert knowledge of a wide range of analytical and evaluative methods and techniques to review and evaluation proposals, conduct studies, develop recommendations, and to analyze new or revised policies and procedures.

Ability to demonstrate initiative, originality, and creativity of a high order to render sound judgments on a wide range of complex management and policy issues to the Director and other top management officials.

Exceptional communication skills in order to effectively represent the Director or IRS in meetings, conferences, and presentations with higher-levels of executives within the agency, other government agencies, or with Members of Congress and/or their staffs.

I. Program Scope and Effect
Directs administrative activities. The incumbent's efforts and recommendations will often result in substantive program changes, procedural changes, revised program emphasis, or organizational changes that have or could have Service-wide significance. These efforts and recommendations often involve sensitive or controversial matters. The effectiveness of the incumbent directly

affects the functioning of the office, as well as the Director's proficiency to formulate policy and plan short-range and long-range objectives.

II. Organizational Setting

The position is directly accountable to a position at the SES level.

Page 3

III. Supervisory and Managerial Authority Exercised

Advises the Director and other top management officials. The incumbent directs key organizational programs which comprises significant resources and/or assets. As such is delegated managerial authority to set annual, multi-year, or similar long-range financial and budgetary plans. Determines objectives that need additional emphasis; determines best approach or solution for resolving budget shortages; and executes activities which support development of goals and objectives related to high levels of program management and development or formulation. Personally coordinates the recommendation of and/or solution to major projects or problems arising in connection with operating policies, programs, workloads, and objectives, etc. And coordinates with other managers and program officials.

Additionally, the incumbent:

> Plans work to be accomplished by subordinates, sets and adjusts short-term priorities, and prepares schedules for completion of work.
>
> Assigns work to subordinates based on priorities, selective consideration of the difficulty and requirements of assignments, and the capabilities of employees.

Evaluates work performance of subordinates and makes recommendations for outstanding performance recognition or disciplinary action.

Gives advice, counsel, or instruction to employees on both work and administrative matters.

Interviews candidates for positions in the team; recommends appointment, promotion, or reassignment to such positions.

Hears and resolves complaints for employees, referring group grievances and more serious unresolved complaints to a higher level supervisor of manager.

Effects minor disciplinary measures, such as warnings and reprimands, recommending other action in more serious cases.

Identifies developmental and training needs of employees, providing or arranging for needed development and training.

Initiates ways to improve production or increase the quality of the work directed.

Develops or participates in setting performance standards.

Approves and disapproves leave and recommends action in unusual cases.

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IV. Nature and Purpose of Contacts

Contacts are with IRS officials at all levels, both internally and externally, and with various groups and individuals outside the Service, officials of other federal

agencies, Members of Congress, state tax and law enforcement officials, and public information media. Contacts may take place in meetings, conferences, briefings, speeches, presentations, or oversight hearings and may require extemporaneous responses to unexpected or hostile questioning. Preparation typically includes briefing packages or similar presentation materials and may require extensive analytical input by the incumbent and subordinates.

Contacts are made to convey the Director's decisions, policies, and views; to ensure effective operations; to present recommendations and proposals; to negotiate results and resolve some issues; and to gain cooperation and coordinate a wide range of activities. The incumbent must use leadership and similar skills to obtain the desired results.

V. Difficulty of Typical Work Directed

The position accomplishes work through the administrative direction of others at least 25 percent of the time comparable to the GS-13 or higher level

VI. Other Conditions:

Coordination of the work of subordinates requires significant and extensive coordination and integration of a number of important program segments and projects involving work comparable in difficulty to the GS-13 or higher level. Supervision at this level involves major recommendations, which have a direct and substantial effect on the organization and projects managed. Makes recommendations in areas comparable to those involving significant internal and external program and policy issues affecting the overall organization, or restructuring, reorienting, recasting immediate and long rang goals, objectives, plans, and schedules to meet substantial changes in legislation, program authority, and/or funding.

GENERAL RESPONSIBILITIES

Fosters a high profile of the IRS Occupational Safety and Health Program by assuring employees' awareness of potential safety hazards, promptly reporting all injuries and affecting corrective actions necessary to eliminate safety and health hazards in the work area.

EQUAL EMPLOYMENT OPPORTUNITY

Practices sound position management in assigning work, combining/separating duties, establishing/abolishing positions and in fulfilling other personnel management duties and responsibilities.

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SECURITY AWARENESS

Participates in the administration of the Information Security Program to protect taxpayer data. Ensures a high degree of subordinate employee awareness of and compliance with the need to protect sensitive (e.g., taxpayer, personnel, procurement, etc.) data within or through systems under their control. Ensures the effective delivery of services targeted to assure all managers and employees are aware of their roles and responsibilities for the protection of sensitive data. Conducts training for employees and promotes security awareness to prevent any lapses.

Final Classification:

GS-343-15, Supervisory Program Analyst

RESPONSE: To request for the 2002 return purportedly made by the Secretary for the Petitioner:

Dear Mr. Selgas:

This is in response to your Freedom of Information Act (FOIA) request dated October 20. 2004. which was received by the Ogden Campus Disclosure Office and subsequently transferred and received in our Los Angeles Office on November 4,2004. In order to assist the Ogden Office, we have accepted the transfer of this case.

Our research shows that there is no copy of a Form 1040, U.S. Individual Income Tax Return, for the calendar ending December 31.2002, in the Substitute for Return Administrative file; therefore we have no documents responsive to your request.

Enclosed is Notice 393 that explains the exemptions and provides your appeal rights. Please be advised that a request under the Freedom of Information Act or Privacy Act in no way postpones or delays administrative examination, investigation or collect actions.

If you have any questions, please contact Carrie L. Kawahara, Senior Disclosure Specialist, Badge Number 95-00053, at 213-576-3635,300 N. Los Angeles Street, Mail Stop 1020. Los Angeles. CA 90012. Refer to Case Number 95-2005-00342.

Sincerely,

/s/ Susan J. Hernandez
Disclosure Officer
Los Angeles Office